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BRIEF FOR APPELLANT

Sir:

This is a Brief on Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

BRIEF FOR APPELLANT

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Unilever Bestfoods, North America, Division of Conopco, Inc., a corporation of the State of New York.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 1-4, 6, 7, and 12, the pending claims in the application. Claims 5 and 8-11 had been canceled. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

An Amendment after the Final Rejection was filed on July 14, 2008, and was entered by the Examiner for purposes of appeal.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The present invention relates to dry and/or particulate savory food compositions that are selectively low in triglycerides of trans-unsaturated fatty acids.

Independent Claim 1 is directed to a Savoury food composition comprising

5-80% by wt of triglycerides of fatty acids,

5-70% by wt of an edible salt,

0.1-50% by wt of tomato powder and/or vegetable pieces and/or monosodium glutamate,

less than 10% wt of water,

wherein the amount of triglyceride of 3 saturated fatty acids of 16 or more carbon atoms (H3) and triglyceride of 2 saturated fatty acids of 16 or more carbon atoms and 1 cis-unsaturated fatty acid (H2U) taken together is at least 55% wt based on the total amount of triglycerides;

wherein the amount of palmitic fatty acid (C16:0) based on the total amount of fatty acids is between 30 and 70% wt;

said composition being in the form of a particulate soup or sauce concentrate which yields a soup or sauce upon mixing and heating with an aqueous liquid,

said composition being substantially free from animal fat; and

wherein said composition is particulate matter; wherein said particulate matter comprises flakes, granules, powder, cubes, pellets, tablets.

Support for claimed subject matter may be found in the Specification, at p. 4, lines 27-30; page 5, lines 4-6, 16-17, and 23-28.

Dependent Claim 6, directed to the composition according to claim 1, wherein the amount of H is between 60 and 75% wt based on total amount of fatty acids, is independently patentable.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-4, 6, 7, and 12 were rejected under 35 U.S.C. 103(a) as being unpatentable over Cain, et al., US 5,718,938 (hereinafter Cain '938), in view of Bodnar, et al., US 2002/0098275 and Cain, et al., US 5,756,143 (hereinafter Cain '143).

VII. ARGUMENT

The Claims Are Not Obvious under 35 U.S.C. § 103

The Examiner's position notwithstanding, Claims 1-4, 6, 7 and 12 are not obvious under 35 U.S.C. 103(a) and patentable over Cain, et al., US 5,718,938 (hereinafter Cain '938), in view of Bodnar, et al., US 2002/0098275 and Cain, et al., US 5,756,143 (hereinafter Cain '143). Appellants submit that Claim 6 is independently patentable.

According to the Examiner, Cain '938 discloses a bakery fat composition; containing mixtures of saturated fatty acids having triglycerides with 16 or more carbon atoms and triglyceride fatty acids with 16 or more carbon atoms with cis-unsaturated fatty acids, column 2, lines 18-43.; The invention contains 5-80 wt % of fat, 0-50 wt. % of water, 0-4 wt % of salt, which may be used as a spice, and 0-15 wt. % of leavening agents.; Cain describes a triglyceride ingredient B that is the same ingredient as Appellants H3 and an ingredient A that is the same as Appellants H2U, column 3, lines 16-31.; These ingredients are combined to form a fat mixture containing 10-75 wt. % H3 or S3 and 0-90 wt. % H2U or SUS.; column 4, line 62 – column 5, line 34. ; Therefore, H3+H2U may incorporate up to 100 wt. % of the fat ingredient.; Also, the percentages of H and U, and the ratio of H3:H2U may be any varying range within 10-75 wt. % H3 or S3 and 0-90 wt. % H2U or SUS of the fat composition.

Further according to the Examiner:

Cain '938 also teaches the use of palm oil and palm oil stearin as the triglyceride mix, column 4, lines 18-29; column 4, line 62 – column 5, line 34. Since palm oil is 35-45% palmitic acid (Encyclopedia Britannica), Cain's fat composition may also contain between 30-70 wt % palmitic fatty acid.

The Examiner admits that Cain is deficient as to

(1) addition of herbs, spices or vegetable powder to the homogenous mass of fat mixture in order to create flakes, cubes or particulate broths for soups or sauces.

To cure the vast deficiencies of Cain '938, Bodnar is cited:

Bodnar discloses an edible water-in-oil microemulsion for use in food products which comprises diglycerides, triglycerides and monoglycerides. [004];[0027]. The emulsion may comprise from 40-97 wt. % in oil, 0.1 to 25 wt. % water and other optional ingredients [0017]. A desirable outcome of the invention is the addition of water soluble components such as proteins, salts, sugars, sweeteners, flavoring agents, nutrients, and seasonings to the aqueous phase of the emulsion [0004]; [0024]. In addition, it is preferred that the emulsion comprises large amounts of salt [0025].

Further according to the Examiner:

Cain '143 discloses a blend of long-chain triglycerides and saturated fats, column 3, line 25 – column 5, line 20. Cain '143's invention may be used for all types of food products, including spreads, margarine, bakery products, sauces, soups and dressings. Cain's invention includes the addition of salt. The low percentage of salt in Cain's invention implies that the salt is used as a flavoring spice instead of as a main component in the matrix emulsion; however, Bodnar teaches the use of the aqueous phase of the emulsion to introduce spices and flavoring agents, such as large amounts of salt. Cain's disclosed triglyceride fatty acid composition includes an aqueous phase that may be used to add large amounts of salt, spices or herbs to the triglyceride emulsion. Since a skilled practitioner in the art may vary percentages within a range to achieve a desired results, Cain's emulsion containing from 0-50 wt. % of water may result in a very pasty product like margarine or very dry product like bouillon or powder. See MPEP § 2144.05(II)(A).

Therefore, according to the Office Action:

it would have been obvious for a person of ordinary skill in the art at the time this invention was made to add large amounts of salt, spices, herbs and additional water soluble flavorings, as disclosed by Bodnar, to an emulsion containing long-chain triglycerides of fatty acids, salt and water, such as Cain's, to create a low moisture

paste, bouillon, particulate or broth in any desired shape to produce a soup or sauce, as taught by Cain '143.

Notwithstanding the Examiner's apparent position to the contrary, it is, again, the Applicants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

Claims 1-4, 7 and 12

The present invention, as set forth in independent claim 1, is directed to dry savoury food compositions, specifically particulate soup or sauce concentrates, which are low in trans-unsaturated fatty acids and substantially free of animal fat. The inventive savoury compositions have: 5-80% fat, 5-70% salt, and less than 10% of water, wherein the fat has specified characteristics and is substantially free of animal fat. Such soups and sauces conventionally contain partially hardened vegetable fats, and thus trans fatty acid esters which are undesired for health and legal reasons. The present invention provides alternative fat blends which perform well in manufacturing (e.g. crystallisation speed) as well as in the product (e.g. taste, mouthfeel). Such alternatives were found to have at least 55% wt based on the total amount of triglycerides of H3 (triglyceride of 3 saturated fatty acids of 16 or more carbon atoms) and H2U (triglyceride of 2 saturated fatty acids of 16 or more carbon atoms and 1 cis-unsaturated fatty acid) taken together.

None of the cited references alone or in combination relates to or makes predictable to one skilled in the art the inventive compositions. Cain is deficient as to at least the following:

- (1) the addition of tomato powder and/or vegetable pieces and/or monosodium glutamate to a particulate savoury composition such as soup and sauce concentrates in the form of flakes, cubes, etc., which are substantially free from animal fat; also Cain contains less salt because it is not a savory product;
- (2) H3 + H2U fats at least 55%; and
- (3) amount of palmitic fatty acid (C16:0) based on the total amount of fatty acids is between 30 and 70% wt; and

(4) amount of water, i.e. dry products.

The secondary references fail to cure the deficiencies.

The present invention relates to dry savory foodstuffs (dry is defined in the specification and claimed as comprising less than 10 % wt of water). Instead, the cited primary reference, Cain, U.S. 5,718,938, relates to batters and doughs containing such batters for manufacture of e.g. puff pastry, cookies, and cakes with lower than normal SAFA (saturated and trans fatty acid residues). Such baked goods are usually non-savory applications (usually sweet) and usually not dry. Although the formulations of Cain '938 can contain 0-4 % salt, that does not make them savory applications in the sense of the present application, as the formulations in Cain '938 do not contain 0.1-50% vegetable pieces and/or monosodium glutamate, and in any event contain less salt than the claimed amount. Thus, a person of ordinary skill in the relevant art of dry savory foodstuffs like particulate soup and sauce concentrates, would not find it predictable to come up with the present invention based on the cited art.

Additionally, Cain '938 discloses the use of a fat blend (see bottom col. 6 containing an S3 (similar to H3 in the present application) of 7.6%, and S2U (similar to H2U in the present application) of 33.5%. Thus, H3 + H2U in Cain '938 equals 41.4%, whereas the present application claims for such fats at least 55%.

Moreover, Cain '938 fails to disclose or suggest an amount of palmitic fatty acid (C16:0) based on the total amount of fatty acids of between 30 and 70% wt. While Cain '938 at Col. 2, lines 7-10 discloses 20 % palm oil, with palmitic fatty acids being only a component of palm oil, this is a significantly smaller amount. Cain '938 at Col. 6, lines 43-50 discloses 12.4 wt % C16:0 (palmitic fatty acid), again a smaller content. Accordingly, Cain '938 fails as to the claimed limitation on the amount of palmitic fatty acid (C16:0) based on the total amount of fatty acids being between 30 and 70% wt.

The secondary references fail to cure the deficiencies of Cain '938 as they are directed to different fat systems. A person of skill in the art would not find it predictable to

come up with the present invention in particulate matter as claimed. The cited references do not disclose such particulate matter. Appellants respectfully submit that in order to manufacture a fat-containing matter in particulate form, which also should perform well in terms of e.g. fat-staining, the fat will need to meet certain requirements in terms of melting behavior which are entirely different from the melting behavior fats need to perform in batters and doughs. Thus, a person of ordinary skill in the relevant art would not find it predictable to come up with the savory particulate composition according to the present invention on the basis of the cited art.

Specifically, the relevance of Bodnar to the present invention is not understood. While the present invention relates to particulate matter (e.g., flakes, granules, powder, cubes, pellets, tablets), Bodnar is directed to micro-emulsions that are transparent or translucent and that contain vegetable oil and relatively large amounts of water. See Abstract and Para. 12. Bodnar's are fully liquid compositions which are not suited for the presently inventive particulates, as the material is not solid at all, therefore it will be very prone to oil staining and does by not means fulfill the requirements with respect to the presence of certain triglycerides nor the level of saturated fatty acid moieties. The oil in Bodnar implies that the material is essentially free of solid matter at ambient temperature. Appellants are not questioning the prior existence of salt or the prior existence of fats. Appellants' invention is directed to a unique combination of fats having a unique combination of properties in a dry savory food composition, i.e. one containing salt and vegetable pieces and/or monosodium glutamate.

Cain '143 fails to disclose or suggest particulate matter form of the composition. Example V of Cain '143 only mentions mayonnaise type sauces and not savory sauces to which the present invention is directed. Likewise, Example VI of Cain '143 is directed to ranch style salad dressing and not savory sauces to which the present invention is directed. Additionally, Cain '143 teaches away from the present invention to the extent it uses animal fat (fish oil), thereby rendering its composition unsuitable for vegetarian consumption, in contrast to the present invention as claimed.

Claim 6

The arguments with respect to independent claim 1, above, are restated herein. Additionally, with specific reference to claim 6, the combination of references fails to disclose or suggest:

(5) amount of H of between 60 and 75% wt based on total amount of fatty acids.

Cain '938 fails to disclose or suggest (5) an amount of H of between 60 and 75% wt based on total amount of fatty acids. While Cain'938 at Col. 2, lines 7 -10 discloses that the fat may be hardened fish oil (50%), this is not as high a level as claimed in Claim 6 of the present invention, and is a different kind of fat, as the present invention specifically excludes animal fats. Accordingly, Cain '928 fails to disclose the claimed amount of H and the claimed type of fatty acids. As discussed above, the secondary references fail to remedy the deficiencies.

An obviousness rejection is proper only when "the subject matter as a whole would have been obvious at the time the invention was made ..." (emphasis added). 35 U.S.C. 103. Appellants respectfully submit that the Office Action has improperly chosen certain aspects of one reference and combined them with aspects of other references, without showing where the motivation is to combine them to come up with the subject matter of the present invention as a whole, within the meaning of 35 U.S.C. 103. Appellants submit that the pending claims are not obvious over the cited references, under 35 U.S.C. 103, especially in view of the present Amendment. Reconsideration and withdrawal of the rejection is respectfully requested.

As the Office Action has not cited a reference relating to particulate soups or sauces, and inter alia, for the reasons above, a *prima facie* case of obviousness is lacking. Accordingly, the obligation has not arisen for Appellants to provide supporting factual evidence in addition to that in the Specification.

CONCLUSION

In view of the above, Appellants respectfully submit that proper rejections under 35 USC 103(a) have not been made. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

Respectfully submitted,

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VIII. CLAIMS APPENDIX

1. (previously presented) Savoury food composition comprising
5-80% by wt of triglycerides of fatty acids,
5-70% by wt of an edible salt,
0.1-50% by wt of tomato powder and/or vegetable pieces and/or monosodium glutamate,
less than 10% wt of water,
wherein the amount of triglyceride of 3 saturated fatty acids of 16 or more carbon atoms (H3) and triglyceride of 2 saturated fatty acids of 16 or more carbon atoms and 1 cis-unsaturated fatty acid (H2U) taken together is at least 55% wt based on the total amount of triglycerides;
wherein the amount of palmitic fatty acid (C16:0) based on the total amount of fatty acids is between 30 and 70% wt;

said composition being in the form of a particulate soup or sauce concentrate which yields a soup or sauce upon mixing and heating with an aqueous liquid,
said composition being substantially free from animal fat; and
wherein said composition is particulate matter; wherein said particulate matter comprises flakes, granules, powder, cubes, pellets, tablets.
2. (original) Composition according to claim 1 wherein said amount of H3 + H2U is at least 65% wt based on the total amount of triglycerides.
3. (previously presented) Composition according to claim 1, wherein the amount of triglyceride of 3 saturated fatty acids of 16 or more carbon atoms (H3) is at least 15% wt based on the total amount of triglycerides.

4. (previously presented) Composition according to claim 1, wherein the amount of triglyceride of 2 saturated fatty acids of 16 or more carbon atoms and 1 cis-unsaturated fatty acid (H2U) is at least 40% wt based on the total amount of triglycerides.
5. (canceled)
6. (previously presented) Composition according to claim 1, wherein the amount of H is between 60 and 75% wt based on total amount of fatty acids.
7. (previously presented) Composition according to claim 1, wherein the amount of U is between 20 and 45% wt based on total amount of fatty acids.
- 8-11 (canceled)
12. (previously presented) Composition according to claim 1 in the form of a bouillon or broth cube, which yields a bouillon or broth upon mixing and heating with an aqueous liquid.

IX. EVIDENCE APPENDIX

No additional evidence has been presented.

X. RELATED PROCEEDINGS APPENDIX

Neither the Appellants, their legal representatives nor the Assignee are aware of any proceedings relating to the present Appeal.